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# INDIVIDUAL AND MORAL RESPONSIBILITY IN CRIMINAL LAW

*Adam Walinsky*†

Think of the numbers that our moderator gave us; and then understand that 47% of violent crime is reported. Also consider clearance rates, which have been going down very sharply. For example, the clearance rate on homicide was never, in the past, lower than 90%: it is now down to 67% nationally.<sup>1</sup> The clearance rate on robbery, which is the archetypal street crime, is now 25% nationally.<sup>2</sup> Only half of all robberies are reported. And of those reported, 25% are being cleared by an arrest.<sup>3</sup> A reasonable number of convictions result from those arrests, but 98% of the convictions will be by plea.<sup>4</sup> Therefore, the whole elaborate superstructure of trials, decisions, and appellate opinions actually only address about one-quarter of one percent of what is really happening in the world. While much of the discussion here perhaps does no active damage, it likely does very little good. We would do better to focus on the larger phenomenon.

Discussion of individual responsibility in the criminal law ought to start with an understanding that “criminal law” is a misleading phrase. The criminal law is, in reality, the fundamental social code: you may not hit your neighbor over the head and take his goods. We must accept that this is an individual responsibility to do more than refrain from malign action. Criminal law also goes beyond the question, “What is the moral responsibility of someone else to refrain from crime?” The real question, particularly in a room like this, is “What is our individual responsibility to come to the aid of

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<sup>1</sup> FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1990, CRIME IN THE UNITED STATES 165 (1990).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> John D. Woolright, *The Impact of Jurisdiction Size on Guilty Plea Rates in 569 State Courts*, 74 SOC. & SOCIAL RES. 40 (1989) (finds great variance in guilty plea rate between 60% and almost 100%).

others?" Otherwise, we are just here to agree that we are each isolated and alone, with no community or commonwealth. The professional lives of lawyers may be built on the proposition that we should advance the interests of a single client at the expense of the entire world: let justice, as we call it, rule until the heavens fall. Nevertheless, even lawyers have to understand that bringing down the heavens is not really our mission in life.

One focus must be the conditions of the underclass because this is the breeding ground for the violence that has spread like a stain across every part of this country. Ten years ago, Saul Bellow told us that:

children born outside the law and abandoned by their parents can be eaten by dogs. Eaten by dogs or brought up without humanity. Nobody teaching the young language, human usages or religion, they will go back to the great ancient forests and be like the wild beasts of Orpheus. None of the great compacts of the human race respected. Bestial ventry, feral wanderings, incest and the dead left unburied. . . . Except, of course, that there are no longer any great forests to go back to.<sup>5</sup>

This description is not mere poetry. It is a description of life in which children are growing. We are conservatives. If there is anything for which the conservative tradition stands, it is that the most important human responsibility is to teach the young. By teaching children, we establish the fundamental conservative proposition that there is a past which is important and that there will be a future for which we have a responsibility. Otherwise, we are mere animals lost in the desert of present time.

We must question what we are going to do individually, what responsibility will we take for our fellow citizens, for children who otherwise will grow without the capacity for moral judgment? We can visit upon them as many pains and penalties as we wish; we can kill them in large numbers; we can imprison them in greater numbers, but we are raising more and more of these monsters every year.

Is there evil? Of course. But we ought to ask ourselves: "Why is it that in our country we have so much more evil today than we did twenty, forty or fifty years ago?" If educated people do not ask this question, then no one will, and we will not answer it.

There are several ways in which we can take the individual responsibility to act in the truly conservative sense: the observation of the fundamental moral code. One is as participants in government. As participants in the process of government, in the exercise of

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<sup>5</sup> SAUL BELLOW, *THE DEAN'S* DECEMBER 251 (1982).

power, you can use your position and your access to call the government to its fundamental responsibility. I think it is foolish, even laughable, to blame President Reagan for everything that is wrong in the country. It would, however, be a grave error not to recognize that our government has been truly irresponsible in allowing the continuation of these conditions and in failing to extend the fundamental protections of law and the Constitution to all of the people of the United States. One thing you all can do is not let people forget their responsibilities by making yourselves nuisances or burrs. Force attention to these issues.

Second, we can attempt to create institutions and mechanisms to enable citizens to participate in the establishment and the protection of the law. Some of us have been working to establish a Police Corps. In this Corps, citizens would fulfill a civic duty and serve as police officers on an ROTC principle; to accept, as part of the price of their education, the obligation to share directly in the enforcement of the law and the extension of safety, security, and decency to people trying to raise their children.<sup>6</sup> In this effort, the dedication of one of your founders, Peter Keisler, has been essential.

Third, for those who think that the government is too much with us, there is always room for individual action. The perfect model for individual responsibility in the criminal law are the Guardian Angels; perhaps Curtis Sliwa should be standing here. Some of you may think this example is overdrawn; you are, after all, *lawyers*. You may be thinking "Where does he get off talking about that kind of physical danger, much less the obligation to devote enormous efforts to the change of these conditions?" In response, I want to remind you what some of our responsibilities might be.

Your generation is uniquely favored in the history of this country. You are almost alone in this century in that you have been not called upon to fight in some foreign war. You are the first to benefit from the collapse of the communist empire—something for which Americans over the past forty years have been working, sacrificing, and even dying for. You are the inheritors of an unbelievable wealth of material richness and technology. It is now your turn to join in the sacrifice and effort. I have heard it said, "How does this come to be my responsibility?" People believe the responsibility for poor children belongs to their parents. Consider that the leading cause of death in this country for black children between the ages of one and four is fire. The leading cause of death is kids just burning up because somebody did not attend to them. How is that yours to change? The only rejoinder I have is to suggest that you go to Ar-

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<sup>6</sup> See 137 CONG. REC. H8153-58 (daily ed. Oct. 22, 1991) (statement of Rep. McCurdy).

lington National Cemetery and look at all of the crosses. The men and women buried there did not ask to die in battle. They simply did their duty when called to serve.

On a personal note, I was privileged to be around when this society was created; I know the impulses toward scholarship and public service from which the society was born. I urge you now not to be caught in the easy simplicities of the kinds of discussions that you had in law school. The time for those nice ideological fights is over. The question we must address is how to save our country when the very structure of law and the whole moral basis for its existence is rapidly failing. I know enough of you to be confident that you will play your proper part in this effort over the years to come.